BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFREY L. JARRED Claimant	)	
VS.	)	
SWIFT TRANSPORTATION INC. Respondent	)	Docket No. 1,016,130
AND	)	
INDEMNITY INS. CO. OF N. AMERICA Insurance Carrier	)	

ORDER

Claimant requests review of the April 29, 2004 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's injuries did not arise out of and in the course of employment. The ALJ noted that dropping burning ash from a cigar into a sock and suffering injuries trying to put out the fire is a personal risk and therefore is not compensable.

The claimant requests review of whether the claimant's accidental injury arose out of and in the course of employment with the respondent.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a truck driver for respondent. The claimant testified that as he was driving on Saturday, February 21, 2004, another truck driver called and told claimant that there was a loose mud flap on his trailer. Claimant pulled his truck over to the side of the road and repaired the mud flap. As claimant was getting back into his truck, he stepped onto a small patch of ice and slipped hitting his left leg against the truck's running board.

Claimant had a layover and spent most of Sunday sleeping and noted he had no swelling in his leg. But after claimant resumed driving on Monday, his leg began to swell and became painful. Claimant completed his delivery back in Kansas on Monday and went home. Because of gross swelling in his leg the claimant sought treatment on Wednesday with his family physician, Steven Scheufler, in Wellington, Kansas. Claimant is a type II diabetic, and his doctor referred the claimant to a specialist. On Thursday claimant went to the emergency room due to drainage from the hematoma. Claimant was referred to Wesley Medical Center and was hospitalized for several days. Claimant has not worked since February 23, 2004.

The claimant testified that he slipped on ice getting back into his truck after making repairs to the mud flap on his trailer. No mention was made of suffering a burn to his ankle from a cigar ember.

On cross-examination it was pointed out that the medical records contained a different history of injury. It was noted the February 26, 2004 Consultation Report from the Midwest Center for Wound Healing indicated claimant dropped an ember from a cigar into his sock on his left foot and when he tried to remove the ember he slipped on ice and struck his left tibial area on his truck. A February 27, 2004 letter from Dr. Kimberly Snapp contains the same history of injury that a cigar ember fell into claimant's shoe and as he was recovering from that he slipped on the ice and his leg slid into his truck.

Claimant denied the medical reports reflected what had happened because he testified he got the ember out of his sock when he first got out of his truck.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

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[1] K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

Because the accident occurred while claimant was at work, the accident occurred in the course of claimant's employment. However, the accident must also arise out of the employment before it is compensable under the Kansas Workers Compensation Act.[3]

The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accident and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is performed and the resulting injury. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

The claimant's version of his injury clearly establishes that he suffered a work-related accident. The ALJ did not believe claimant's testimony and adopted the history of accident noted in the medical records. And the ALJ concluded that an accident suffered removing the embers from his sock was a personal risk.

Initially, it should be noted that claimant was smoking while driving his truck and there is no indication in the record that smoking was prohibited. It is undisputed that an ember from his cigar fell into claimant's shoe and burned his ankle. The claimant testified he stopped his truck and removed the ember from his shoe, repaired the mud flap and then slipped hitting his leg as he was returning to the truck. The medical records simply indicate that as claimant was removing the ember from his shoe he slipped and hit his leg.

> Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.[6]

Many of the older cases found smoking to be one way employees relieved work stress and coped with the work day. Smoking was therefore found to benefit both the employee and the employer. Thus smoking falls within the personal comfort doctrine.

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[3] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[4] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[5] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[6] 2 *Larson's Workers' Compensation Law*, § 21 at 21-1 (2000).

A cigarette break is considered analogous to a coffee break and the personal comfort doctrine would control. Thus, when accidental injuries occur while an employee is ministering to personal comfort, such as smoking a cigar in this case, there is not a departure from the employment relationship and the injury is compensable.[7]

The Board concludes claimant had not abandoned his employment at the time of the accident and, consequently, claimant's accident occurred in the course of his employment.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated April 29, 2004, is reversed and remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

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BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] See *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).